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THE FEDERAL ANTI-INJUNCTION STATUTE AND THE RELATED ABSTENTION DOCTRINE[1]

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I. INTRODUCTION

The very existence in this country of a system of federal courts and fifty sets of state courts makes it inevitable that there will be collisions between the two systems. It is imperative that state and federal courts operate in an atmosphere of harmony, or at least mutual respect, and not as antagonists in a power struggle. To that end there should be reasonably clear standards governing whether one court may or should intrude upon an action pending or threatened in another court.

I suggest that it is fruitless to argue whether one system is paramount or superior to the other, whether they are merely concurrent, or whether one system has a better set of judges than the other. In the latter connection, it has been said:

> Though each system of courts moves in a sphere of special competence, there is no reason to believe that a state court is more likely to err in its legal analysis, more likely to flout legal precedent, or more likely to entertain improper litigation than is a federal court.[2]

In short, it is not the purpose here to philosophize but to discuss the practical difficulties and the standards which govern when a federal court is requested to enjoin a proceeding in a

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1. This is an expansion of a paper delivered before the Judicial Conference of the Fourth Circuit in July, 1968. Separate treatment of the anti-injunction statute, 28 U.S.C. § 2283 (1964), and the abstention doctrine by text writers has been excellent. *See, e.g.*, 1(a) MOORE'S 1961 FEDERAL PRACTICE §§ 0.203 *et. seq.* and §§ 208 *et. seq.*; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §§ 47-52 (1963); Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932); Wright, *The Abstention Doctrine Revisited*, 32 TEX. L. REV. 815 (1953); Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965); Anno. 20 L. ED. 2d 1623. However, there seems to be a lack of text treatment of situations which involve both doctrines and their relationships to each other. Perhaps some scholar, impressed with the inadequacies of my effort, will be inspired to do a proper job.

2. Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 727 (1961).

state court. There is also a suggested analytical approach which might eliminate some confusion when a court is considering both the statutory barriers to a stay and the non-statutory abstention doctrine.

There are two sets of limitations upon the federal courts and neither has a constitutional origin. The first, sometimes called the anti-injunction statute, reads in its entirety as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[3]

Again, to limit the scope of discussion somewhat, scholars have found little help in the legislative history surrounding the original adoption of this statute in 1793. There are various conflicting theories as to the motives of Congress but none are of any real help in its interpretation.[4] I would also suggest that, with this ancient parentage of the statute, the debates between John C. Calhoun and Daniel Webster have nothing to do with the matter. The limitation of the statute is neither contained nor suggested in article III of the Constitution, which establishes federal court jurisdiction, and, therefore, for whatever motive, the Congress in 1793 must have meant business when it imposed a sizeable barrier to injunctions against state court proceedings. Perhaps Mr. Justice Frankfurter was correct when he repeatedly stated that the statute was designed "to prevent needless friction between state and federal courts."[5]

In addition to the statute, another limitation upon injunctions against state court actions was created and has been continued by the federal judiciary itself. This is the so-called abstention doctrine under which a federal court may conclude that it will not immediately intervene in a state court controversy, directing the parties to pursue state remedies, sometimes retaining jurisdiction and awaiting the outcome of the state litigation. Thus, a federal judge may have a more complicated choice than Hamlet:

3. 28 U.S.C. § 2283 (1964).
4. See the historical discussion and sources cited by Mr. Justice Frankfurter in Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941).
5. Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1940).

1. to stay or not to stay; or

2. whether to do nothing at all for the time being.

While abstention is somewhat a matter of the exercise of wise discretion, it is not merely a matter of whimsy. Neither are the questions under the statute. Such concepts as the length of the chancellor's foot, or the audacity (or lack of it) on the part of the federal judge have no place here.

In considering these limitations, we face not only the limits of the limitations but questions such as: Do the limits overlap or are they coextensive? Which must be considered first? Can cases invoking federal constitutional questions override both?

Although originating from different branches of the federal government, the doctrines are necessarily related by marriage if not by blood. Although each has vitality, one is often ignored in a given case which produces confusion as to their exact relationship. As will be shown below, in some cases a stay could have been denied on both statutory and abstention grounds, but only one ground was even discussed. In other cases an injunction has been granted without a very satisfactory explanation of the route through or around the two barriers.

More methodical analysis by courts, treatise writers and lawyers might not change the results in many of these cases but it could produce a clarity which is lacking. Clearer understanding is particularly needed concerning the relationship of the statute and the abstention doctrine and the areas barred by one but not the other. A step by step approach which I would suggest that a federal could or lawyer can take in considering a prayer for a stay against state court proceedings would be as follows:

1. Is an injunction barred by statute? It is so barred unless:

(a) the case comes within one of the three exceptions recited in § 2283; or

(b) a proceeding is not actually pending in state court; or

(c) the United States seeks the stay in its sovereign capacity.

2. Even if the statute is no bar to an injunction, the abstention doctrine may require the federal court to stay its own proceedings if:

(a) a state court interpretation or determination is necessary or desirable before determining whether an alleged violation of the United States Constitution exists; or

(b) the stay would be a needless interference with the administration by a state with its own affairs; or

(c) the parties should obtain a state court adjudication of state law questions which are exceptionally difficult, unclear or unlitigated.

3. Even if the statute or the abstention doctrine would normally prevent a stay of state court proceedings, the court may be under a duty in an aggravated case to issue a stay order because there is clear and imminent danger of irreparable damage by manifestly unconstitutional acts.

4. If no stay of state proceedings is sought, the anti-injunction statute does not apply but the federal court may be required to stay its own proceedings by the abstention doctrine. There are cases in which the anti-injunction statute is no barrier but the court is required to abstain from a decision on the merits. A summary of the two doctrines follows.

II. THE ANTI-INJUNCTION STATUTE

The statutory bar has been applied to a number of different types of subject matter. A fairly classic type is parallel insurance litigation. An insurer may commence an action in federal court seeking a declaratory judgment concerning a coverage question or its duty to defend a given claim alleged by the insured to be covered by the policy. At the same time, there may be pending in state court tort actions against the insured who has demanded a defense. Pursuant to the statute, the courts have consistently denied a request for injunction against the state court actions and each action has proceeded to its own independent conclusion.[6] In addition to § 2283, there are some similar statutes of more limited application which prevent federal courts from enjoining the assessment of state taxes

6. *E.g.*, Kline v. Burke Constr. Co., 260 U.S. 226 (1922).

where there is an adequate remedy in state court[7] and which prohibit injunctions against rate orders of state agencies.[8]

As seen in § 2283 itself, there are three categories of exceptions to the prohibition. In its original version, the prohibition was absolute on the face of the statute.[9] Exceptions were carved out by judicial decisions until 1948 when it was amended to add specific exceptions. The first statutory exception permits such an injunction when it is expressly authorized by an Act of Congress. It seems clear that statutory authority for such an injunction does not have to make specific reference to the anti-injunction statute.[10] As will be seen, however, the statuory ground of power to stay must be clearly and affimatively granted. For example, the Bankruptcy Act has various provisions giving a bankruptcy court such powers in various situations to protect its jurisdiction over the debtor, the debtor's assets and the orderly administration of the bankruptcy estate. In the garden variety bankruptcy case, in which the assets are assembled, priority of claims determined, and the assets distributed pro rata, there are few problems or serious questions about the bankruptcy court's powers. It can clearly stay state court foreclosure or attachment proceedings against the various properties of the bankrupt.[11] It can stay pending cases involving dischargeable claims and require that they be proved in the bankruptcy court.[12]

There are types of bankruptcy, however, which involve reorganization rather than liquidation and distribution, in which the bankruptcy court has less power to enjoin a state court action. Among the reorganization cases, an interesting example is *Callaway v. Benton*.[13] There the Central of Georgia Railroad entered into reorganization proceedings under Section 77 of the Bankruptcy Act.[14] The bankrupt was the lessee of railroad properties of South Western Railroad Company. After some proceedings in the bankruptcy court, South Western pro-

7. 28 U.S.C. § 1341 (1964).
8. *Id.* § 1342.
9. "[N]or shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state . . . ." Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335.
10. Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955).
11. 1 COLLIER ON BANKRUPTCY ¶ 11.02 (J. Moore ed. 1968).
12. 11 U.S.C. § 29 (1964).
13. 336 U.S. 132 (1949).
14. 11 U.S.C. § 77 (1964).

posed to convey its property to the Central in exchange for bonds in a court approved plan. Some of its stockholders brought a state court action to enjoin the sale as lacking approval required by state law. The Supreme Court held that the bankruptcy court was prohibited by the anti-injunction Act from staying the state court action, although arguably it was an attack on consummation of the plan of reorganization; that the corporate procedures to authorize the sale were strictly a question of state law and governed by no provision in the Bankruptcy Act. The Court stated in part:

> We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded. There can be no question, however, that Congress did not give the Bankruptcy Court exclusive jurisdiction over all controversies that in some way affect the debtor's estate . . . . What it did give was exclusive jurisdiction of the debtor and its property wherever located.[15]

Another affirmative statutory injunctive power is contained in the Interpleader Act.[16] This is a procedure by which multiple claimants to a fund or particular item of property have their claims determined by the federal court. The statute granting the remedy provides specifically that the interpleader court shall have power to issue its process against claimants to the fund or property and to issue an order against each, enjoining them from instituting or prosecuting any suit or proceeding in any state court or any other federal court. But even here it has been properly held that the court may be required to lift its stay to permit decision of a state law property question.[17]

Even though a federal statute has created a body of federal law which may in large measure preempt the field, it does not always follow that this grants injunctive power to the federal court against any and every state court action. In the labor field, the Labor-Management Relations Act[18] has, to a large extent, preempted the subject matter of labor-management rela-

15. Callaway v. Benton, 336 U.S. 132, 141-42 (1949); *cf.* Carolina Pipeline Co. v. York County Natural Gas Authority, 388 F.2d 297 (4th Cir. 1967).
16. 28 U.S.C. § 2361 (1964).
17. Humble Oil & Ref. Co. v. Copeland, 398 F.2d 364 (4th Cir. 1968); Hickok v. Gulf Oil Corp., 265 F.2d 798 (6th Cir. 1959).
18. 29 U.S.C. §§ 151-68 (1964).

tions.[19] It does not follow, however, that state court jurisdiction can always be ousted by reliance upon the labor statute. An example of this fact is contained in *Amalgamated Clothing Workers v. Richman Brothers.*[20] There in a labor dispute the employer sought injunctive relief in the state court against the labor union. The Union asked the federal court to stay the proceedings upon the ground that the subject matter was an exclusive federal matter under the federal statute. The Supreme Court (per Frankfurter) held that such a stay was improper under the § 2283 prohibition.

In so holding, he stated: "By that enactment, Congress made clear beyond cavil that the prohibition [of § 2283] is not to be whittled away by judicial improvisation."[21] This was a difficult decision, because the Court had previously held that the NLRB could obtain a stay (under § 1337) against a state court injunction proceeding.[22] The distinction is apparently that the labor statute gives the injunctive remedy only to the NLRB.

The remaining two exceptions in § 2283 were added in 1948 largely to change the Supreme Court decision in *Toucey v. New York Life Insurance Co.*[23] In that case, Toucey had brought an action originally in state court alleging a breach of contract of insurance for disability. The action was removed to federal court. The company won and no appeal was taken. Later, Toucey assigned his claim to another person in order to make removal impossible and attempted to sue the company again to collect his disability claim. The company sought an injunction against this second action and it was granted by the lower courts. However, the Supreme Court reversed, holding, in effect, that the company would have to defend on the ground of *res judicata.*

The 1948 amendments added the additional exceptions of the statute which permit an injunction (a) if it is necessary in aid of the federal court's jurisdiction (already there by judicial interpretation), or (b) to protect or effectuate its judgments.[24]

An injunction to protect or effectuate the judgment of a

19. *See* Garner v. Teamsters, 346 U.S. 485 (1953).
20. 348 U.S. 511 (1955) [hereinafter referred to in the text as *Richman*]
21. *Id.* at 514.
22. Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954).
23. 314 U.S. 118 (1941) [hereinafter referred to in the text as *Toucey*].
24. 62 Stat. 968, ch. 646 (1948).

federal court permits an injunction like that sought in the *Toucey* case to prevent the relitigation of a claim already decided by the federal court.

The exception permitting an injunction in aid of the jurisdiction of a federal court is in line with previous judicial decisions prior to the *Toucey* case which carved out exceptions to the statute by judicial interpretation. For example, when a case is removed to federal court, if necessary, the court can enjoin the plaintiff from pursuing the same action in any state court.[25]

The aid of federal jurisdiction exception was relied upon by the Supreme Court in another labor case, *Capital Service, Inc. v. NLRB*,[26] in which the stay was sought by the NLRB against state court injunction proceedings in subject matter over which the NLRB alleged to have had exclusive jurisdiction under the National Labor Relations Act. The *Richman* case (*supra*) did not overrule *Capital Service. Richman* denied a stay to a private party under § 2283, but a federal agency in the same subject matter is not barred because of this exception in the statute. The same exception of the aid of federal jurisdiction has produced decisions to the effect that § 2283 does not bar an injunction sought by the United States in the exercise of its sovereign power against the state court proceeding.[27] While this may be difficult to read into the statute, it should be borne in mind that the statute is one of judicial policy or comity rather than a constitutional or jurisdictional concept.

In this context, it is an interesting inquiry to ask whether or not a state court in proper circumstances may stay or prevent the bringing of an action in federal court. Without developing this in detail, it can be said as a general proposition that state court attempts to do so have met with limited success. In the case of *Donovan v. City of Dallas*, [28] the Supreme Court decided, in effect, that what is sauce for the goose is not necessarily sauce for the gander. A group of plaintiffs lost their case in a Texas state court[29] (an attack on a bond issue),

25. French v. Hay, 89 U.S. (22 Wall.) 250 (1875).
26. 347 U.S. 501 (1954) [hereinafter referred to in the text as *Capital Service*].
27. Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).
28. 337 U.S. 408 (1964) [hereinafter referred to in the text as *Donovan*].
29. Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Ct. Civ. App. 1961).

and then commenced another action in the United States District Court of Texas on the same subject matter. The defendants sought and obtained a stay against further proceedings by the plaintiffs from a state court in Texas. This may be a classic case on courts harrumphing about their prerogatives. When they continued to press their federal case, eighty-seven plaintiffs were convicted and punished for contempt by the Texas court. Donovan, the attorney for the plaintiffs, served 20 days in a Texas jail. The Supreme Court reversed the conviction after Mr. Donovan's unsuccessful attempts to get a writ of habeas corpus from either a state or federal court. Although this was the classic relitigation situation which the 1948 amendments put into § 2283, it was held that the state court was without power to enjoin the federal action. The result was that the defendants had to establish their plea of *res judicata* in the second case. The logic of the *Donovan* case has been attacked, but it does have historical support.[30] The same reminder is again appropriate that § 2283 is not a jurisdictional or constitutional concept. When federal jurisdiction clearly exists as in *Donovan* and as granted by federal law, the states are without power to do anything about it. I submit that this is not any new demise of state's rights. "Though the federal courts are not superior to state courts, federal law is supreme over state law. . . ."[31]

There is a line of *in rem* cases in which the state courts, with the blessings of the Supreme Court, have successfully stayed a federal court action. In *Princess Lida v. Thompson*[32] a trustee and the beneficiaries brought a state court action to compel specific performance of a trust against the settlor. The beneficiary then brought a federal court action against the trustees for mismanagement. Each court issued an injunction against prosecution of the other action. The Supreme Court broke the log jam and upheld the state court injunction upon the ground that it had prior jurisdiction of the *res* (the trust). The test should not necessarily be a race to the court house, yet here is an area for federal jurisdiction yielding to state jurisdiction.

30. *See* Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, especially 498-502 (1965).
31. ALI *Study of the Division of Jurisdiction Between State and Federal Courts*, at 236 (Tent. Draft No. 6, 1966).
32. 305 U.S. 456 (1939).

III. THE ABSTENTION DOCTRINE

This doctrine has been fashioned and perpetuated by the federal courts themselves and never by statute. As will be shown, however, there are indications that some purportedly abstention cases are adding an exception to § 2283. Again, this is a rule of policy and comity rather than an abandonment of power or jurisdiction. There is considerable confusion in this area because of the absence of a step-by-step analysis of the statutory and judicial doctrines. Under the abstention doctrine, a federal court simply declines to pass upon the merits and leaves the parties to their state remedies. Sometimes it appropriately retains jurisdiction and awaits the determination of state issues of insurance for disability; the action was removed to federal decision of federal issues resulting from the state determination. Sometimes it simply dismisses, leaving the parties solely to their state remedies. Abstention may also be an appropriate step to take in an application of § 2283 whereby the federal proceedings are merely delayed rather than totally barred, reserving the federal questions for later decision.

There is a large body of cases requiring abstention in which apparently the anti-injunction statute does not apply, either because there was no state court action pending or because it was within one of the exceptions to the statute. One of the earliest decisions was *Railroad Commission v. Pullman Co.*[33] There the commission had ordered that no sleeping car could be operated in the state of Texas unless such cars were continuously in charge of an employee having the rank of pullman conductor. The company attacked the order before a three-judge federal court and obtained an injunction against its enforcement on the ground that it was not authorized by Texas law and that it violated the equal protection, due process and commerce clauses of the United States Constitution. With no reference to § 2283 (but apparently assuming its inapplicability —no state court action pending) the Supreme Court reversed the order of injunction below and directed the district court to retain jurisdiction pending a determination of proceedings to be brought by the parties in state court, stating:

> [T]he last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor

33. 312 U.S. 496 (1941) [hereinafter referred to in the text as *Pullman*].

> to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication . . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.[34]

In the non-statutory abstention situation, there are several categories of cases. First, there is the situation in which state action is challenged in the federal court as being void under the United States Constitution, when there are state questions upon which the federal question must depend. This is exemplified by the *Pullman* case (*supra*). The result in this category is that the federal court avoids deciding a federal constitutional issue prematurely, or sometimes unnecessarily, as a state court ruling may make a federal constitutional ruling unnecessary. The federal court often retains jurisdiction as it did in *Pullman* until the state litigation is finished.

Another branch of judicial abstention is a rule of self restraint against exercising federal jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs; *i.e.*, collection of taxes and interpretation of its taxing statutes and enforcement of its criminal law.[35] Usually, but not always, the federal court simply dismisses and does not retain further jurisdiction.

There is a third category of abstention in which the federal court declines to exercise its jurisdiction when it would have to decide unusually difficult, unclear, or unlitigated questions of state law. Of course, under the *Erie* doctrine the federal courts decide state law questions all the time, especially in the area of tort litigation. However, this is a matter of applying well-known doctrines to different factual situations. Thus, there are difficult questions and then there are more difficult questions. *Thompson v. Magnolia Petroleum Co.*[36] is an example

34. *Id.* at 500.
35. Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).
36. 309 U.S. 478 (1940) [hereinafter referred to in the text as *Thompson*]; *cf.* Meredith v. City of Winter Haven, 320 U.S. 228 (1943).

of this third category. There a railroad was in reorganization under § 77 of the Bankruptcy Act [37] and the question arose between the trustee and certain other claimants as to who had the legal right to drill for oil under the bankrupt railroad's right-of-way over a newly discovered oil field. The Supreme Court concluded that it was desirable for the parties to litigate this question in the state court because it involved unsettled questions of state property law which should not be properly adjudicated in the course of a bankruptcy administration; but the Court did not mention § 2283.

An interesting way out of the difficult state law question situation has arisen in recent years. If the states follow up on this avenue, it may be the proper answer in some instances. Some states have a statutory procedure whereby questions of law may be certified to the supreme court of the state. Several times in the last few years, the United States Supreme Court has followed this avenue, abstaining until it receives answers from its certified questions to the state court of last resort.[38] This is an interesting approach, but it will not handle all cases. There first must be a clear-cut procedural avenue for the certification of questions to the state supreme court by a federal court. This exists in only four states.[39] I would suggest, moreover, that this procedure will not work when there are factual issues involved in the controversy and, in the exercise of abstention, the parties must proceed with their state remedies beginning at the trial court level. Under the certificate method, however, the unclear or unlitigated state question can receive its final determination from the place that it should, namely, the supreme court of a state, thus furnishing the predicate for adjudication of federal issues by the abstaining federal court.

In the constitutional type of abstention cases, there have been numerous abstentions. There is a growing body of law, however, requiring the federal court to face a choice of two opposite duties: first, a duty to abstain, and second, a duty in a proper case to intervene and decide the constitutional issue on the merits, restraining the state courts rather than permitting the

37. 11 U.S.C. § 77 (1964).
38. Dresner v. Tallahassee, 375 U.S. 136 (1963); Aldrich v. Aldrich, 375 U.S. 249 (1963).
39. FLA. STAT. ANN. § 25.031 (1961); HAWAII REV. LAWS (1955); ME. REV. STAT. ANN. tit 4, § 57 (1964); WASH. REV. CODE § 2.60 (1964).

state litigation to proceed. Decisions here, often in a civil rights context, have gone both ways.

In *Harrison v. NAACP*,[40] there was an action to declare the Virginia statutes against barratry unconstitutional on the grounds that, while a proper subject of state regulation, they were void for "overbreadth" in that they went too far in the exercise of state police power and trespassed upon free speech and other federally protected rights. The required three-judge court found some of the statutes unconstitutional on their face and enjoined enforcement by the state. Citing the *Pullman* case, the Supreme Court held that the district court should have abstained and waited state interpretation of the statute. Likewise, in *Meridian v. Southern Bell Telephone & Telegraph Co.*[41] the Supreme Court reversed a holding that a state statute imposing a use charge upon utilities was unconstitutional. In so doing, it also relied upon the difficult state law question, as in *Thompson*, stating that "the state law problems are delicate ones, the resolution of which is not without substantial difficulty, certainly for a federal court."[42] It was held that the lower court should have abstained and retained jurisdiction until the state interpretation was obtained.

While *Thompson* is probably confined to similar bankruptcy situations, there are others of general application like the *Meridian* case. In *Louisiana Power & Light Co. v. Thibodaux*,[43] a condemnation action was removed to federal court on the ground of diversity and the proposed taking was challenged. The district judge, on his own motion, ordered abstention until the Supreme Court of Louisiana could interpret the condemnation statute. Although the statute was old, it was unclear and had never been judicially interpreted. An early opinion of the state's attorney general, moreover, cast doubt upon the city's power to take. The court of appeals reversed,[44] but the Supreme Court decided that the district judge had acted properly by retaining jurisdiction awaiting an interpretation of the statute by a state court declaratory judgment action.

40. 360 U.S. 167 (1959) [hereinafter referred to in the text as *Harrison*].
41. 358 U.S. 639 (1959).
42. *Id.* at 640.
43. 360 U.S. 25 (1959).
44. 255 F.2d 774 (5th Cir. 1958).

IV. CONSTITUTIONAL CASES WHICH CAN REQUIRE FEDERAL COURT INTERVENTION

There is a category of cases which straddle all of these problems of statutory and judicial restraint upon federal courts with the added problem of the traditionally greater reluctance to intervene in state court criminal proceedings. In each of these cases there was an allegation that the state criminal statute involved was void under the United States Constitution. This line of cases begins with *Douglas v. City of Jeanette*.[45] *Douglas* was an action by a group of Jehovah's Witnesses to enjoin prosecution under a city soliciting ordinance which allegedly infringed their rights to free speech. Federal relief was sought under Civil Rights Act of 1871.[46] The Supreme Court held that while the lower court had jurisdiction to decide the question, there were insufficient grounds for an injunction against state court prosecution unless it was apparent that injunctive relief was necessary to prevent irreparable injury which was clear and imminent. It, therefore, continued the rule of comity enunciated in the *Pullman* case, but suggested an exception.

One problem with some of these cases is that they either fail to mention § 2283, or fail to decide its applicability. It would seem that the first step would be to consider whether the statute is a barrier and then enter the murky area of judge-made rules on abstention. However, § 2283 is frequently confined to footnotes, the court saying that the question was not reached.

The Supreme Court has said that a mere allegation that a state statute is unconstitutional does not prevent abstention.[47] This proposition is sound because two things may happen in the state litigation. First, the state court may strike the statute down under the state constitution. Second, the state court may so limit the statute by interpretation that it removes the constitutional problem.

The Court of Appeals for the Fourth Circuit wrestled with this problem in *Baines v. City of Danville*[48] in 1964. There

45. 319 U.S. 157 (1943) [hereinafter referred to in the text as *Douglas*].
46. 42 U.S.C. § 1983 (1964).
47. Harrison v. NAACP, 360 U.S. 167 (1959).
48. 337 F.2d 579 (4th Cir. 1964) [hereinafter referred to in the text as *Baines*].

various actions were brought in the district court seeking injunctions against prosecution as a result of civil rights demonstrations, involving a city ordinance limiting demonstrations and picketing. Also involved was some state injunctions as well as criminal prosecutions as a result of this conduct. The district judge declined to enjoin the pending criminal prosecutions. The court of appeals issued temporary restraining orders pending appeal but, after argument, dismissed the orders and remanded for consideration of the appropriateness of the injunction against future arrests. It was held that the anti-injunction statute barred a stay unless the principle of comity was overridden by constitutional considerations. The court pointed out that the statute and the abstention doctrine under *Douglas* are rules of comity but not absolute jurisdictional bars.

Subsequent to *Harrison* and *Baines* were two Supreme Court cases holding that a district court (1) was in error in abstaining under *Douglas* and, (2) was under an affirmative duty to enjoin enforcement of the allegedly unconstitutional state statute.[49] In each case a declaratory judgment of unconstitutionality was sought as well as an injunction against enforcement. *Douglas* was distinguished on several grounds, one of which was the allegation that the statutes were unconstitutional on their face.

Dombrowski v. Pfister[50] was an attack upon Louisiana statutes on subversive activities and the "Communist Propaganda Control Law." Plaintiffs were active in the Negro civil rights movement and claimed threatened prosecutions did not really seek convictions but were designed to harass and limit their right to free speech. The three-judge court dismissed upon motion. Citing the landmark case of *Ex parte Young*[51] the Supreme Court reversed, holding the statutes were justifiably attacked on their face. In a footnote the Court stated that since indictments had not been obtained there was no state proceeding pending and, therefore, § 2283 had no application—a rather undignified way to relegate the anti-injunction statute to second class status. The dissent also discussed § 2283 in a

49. Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965).
50. 380 U.S. 479 (1965) [hereinafter referred to in the text as *Dombrowski*].
51. 209 U.S. 123 (1908).

footnote saying the statute would be a bar had the state prosecautions commenced first.

In *Zwickler v. Koota*[52] declaratory and injunctive relief was sought against a Pennsylvania statute prohibiting distribution of anonymous political handbills. Plaintiff had obtained a state court reversal of his conviction on non-constitutional grounds. The three-judge court abstained and ordered dismissal. The Supreme Court reversed. It held that the lower court had a *duty* to decide the merits of the prayer for a declaratory judgment, irrespective of whether it felt circumstances justified injunctive relief. The concurring opinion pointed out that the mere pleading of unconstitutional overbreadth and a prayer for declaratory judgment should not necessarily prevent abstention.

The latest word in this series is *Cameron v. Johnson.*[53] The plaintiffs brought an action in district court seeking a declaratory judgment that the Mississippi anti-picketing law was an overly broad and vague regulation of expression and, therefore, void on its face. They also sought a permanent injunction against the enforcement of the statute, as an infringement of free speech and as a plan of selective enforcement solely to discourage plaintiffs from picketing in protest of racial discrimination. A three-judge court dismissed the action on the ground that extraordinary relief of injunction was not justified and because of the abstention doctrine. On its first trip to the Supreme Court, the Court remanded the case for reconsideration in the light of the *Dombrowski* decision and to determine specifically whether § 2283 was a bar.[54] Upon remand, the three-judge court, after hearing evidence, dismissed the action with prejudice. The Supreme Court affirmed. The majority in *Cameron* had evidently lost interest in § 2283, referring to it again only in a footnote, saying that it was unnecessary to resolve the question. On the merits, it upheld the conclusion that the statute was a valid law dealing with conduct subject to regulations, and although free speech was involved the statute did not infringe upon constitutional barriers. The Court distinguished *Dombrowski* with the assertion that the case involved "the impropriety of state officials invoking the statute in bad

52. 389 U.S. 241 (1967) [hereinafter referred to in the text as *Zwickler*].
53. 390 U.S. 611 (1968) [hereinafter referred to in the text as *Cameron*].
54. 381 U.S. 741 (1965).

faith to impose continuing harrassment in order to discourage appellant's activities."[55] In *Cameron*, the Court found neither harrassment, intimidation nor oppression. Rather, it found good faith prosecution for deliberate violation of a valid statute. The Court further stated that the question for the district court was not the guilt or innocence of plaintiffs but whether the enforcement was being attempted with no expectation of convictions but only to discourage the exercise of federally protected rights. This seems to reaffirm the holding in *Zwickler* that the abstention doctrine does not limit jurisdiction.

In evaluating *Cameron*, one should not regard it as a power shift in the Supreme Court after *Dombrowski* and *Zwickler*. Justice Brennan wrote the majority opinion in all three cases. It appears that the anti-injunction barriers are real and, where applicable, can be overridden only an in extraordinary case involving a constitutional problem and an aggravated set of facts.

The Supreme Court in *Dombrowski* declined to decide whether the older Civil Rights Act[56] created a statutory exception to § 2283. In the constitutionally protected civil rights field, however, the projected course seems to lead around the anti-injunction statute. Either the exception to the statute will be found or, following the lead of *Dombrowski*, the Court may find that a constitutional attack on the face of a state statute raises a constitutional duty paramount to § 2283.

I do not agree with the eminent authors of a 1932 law review article that § 2283 "has long been dead."[57] Constitutional duties are one thing (although forever debatable on the merits), but extraordinary remedies do not always follow.

V. THE AMERICAN LAW INSTITUTE PROPOSALS

At the request of Chief Justice Warren, the American Law Institute has addressed itself to various problems connected with the relationship between state and federal court systems and specifically the anti-injunction statute and the abstention doctrine. In a draft entitled "Study of the Division of Jurisdiction Between State and Federal Courts" it has proposed new

55. 390 U.S. 611, 619 (1968), *quoting from* 380 U.S. 479, 490 (1965).
56. 42 U.S.C. § 1983 (1964).
57. Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932).

statutes covering this subject matter. They are proposed as §§ 1371, 1372, and 1373 of Title 28, U.S. Code. The text of these sections is reproduced, *infra*, as an appendix. While it is beyond the purpose of this article to detail the impact of these new sections, if passed by Congress, some comments are in order.

Proposed § 1371 would, for the first time, codify the abstention doctrines into statutory law. Proposed § 1372 would be an amendment to § 2283, the anti-injunction act. Proposed § 1373 would, for the first time, enact a statute covering the area in which a state court may or may not grant a stay against federal court proceedings.

The main approach of these proposed statutes seems to be to clarify and codify rather than make extensive substantive changes in existing law. The reader who has struggled this far can at least agree that further clarity is needed. It is regrettable that the courts have not been able to produce this clarity. At least part of the difficulty was occasioned by the frequent failure of the courts to measure a problem against both the anti-injunction statute and the abstention doctrine. Such an approach will be necessary to maintain clarity even under the new statutes, if passed.

In an abstention situation, it will leave the litigation of the unusual, difficult or unresolved abstention question where it should be; namely, the state court with review on the merits by the United States Supreme Court. Hopefully, this will help district courts resist the temptation to attempt to be reviewing authorities of state law problems and avoid the embarrassment of the erroneous interpretations of state law. Interim relief can be given to prevent irreparable harm. However, it is to be hoped that each system of courts will fish in its own substantive waters.

The exceptions enumerated in the anti-injunction statute, as proposed, would be clearer, particularly in the area of civil rights cases.

Proposed § 1373 will change the result of the *Donovan* case and permit state court stays against federal proceedings to prevent harassing relitigation or to protect the jurisdiction of the court or property in its custody.

VI. CONCLUSION

The systems of state and federal courts must continue to navigate on parallel rather than collision courses. There is the obvious need for uniform interpretation of federal law and the protection of federally granted rights. There is a corresponding need within a given state for uniform interpretation of state law and the protection of state-granted rights. The anti-injunction act and its cousin, abstention, are necessary doctrines. To bury either of them would produce a kind of judicial chaos and unnecessary whipsawing of litigants which the federal courts themselves would wish to avoid. The barriers to intrusion by one system upon the other's jurisdiction are real, but their exact delineation by the courts has sometimes been less than clear. The complex problems facing the judiciary today, and in the future, make it imperative that the relationship between state and federal judicial systems be uppermost in the minds of the judges in both systems.

APPENDIX

THE STATUTORY CHANGES RECOMMENDED BY THE AMERICAN LAW INSTITUTE

§ 1371. *Abstention and stays in certain cases*

(a) A district court shall stay any action to enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law, or for a declaratory judgment with regard thereto, if a plain, speedy, and efficient remedy may be had in the courts of such State.

(b) A district court shall stay any action to enjoin, suspend, or restrain the operation of, or compliance with, any order of any administrative agency of a State, or a political subdivision thereof, or for a declaratory judgment with regard thereto, if: (1) the order affects rates chargeable by a public utility, or the conservation, production, or use of minerals, water, or other like natural resource of the State; and (2) the order has been made after reasonable notice and hearing and (3) a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) the power of the State to make such order has not been superseded by any Act of Congress or administrative regulation thereunder.

(c) A district court may stay an action, otherwise properly commenced in or removed to a district court under this title, on the ground that the action presents issues of State law that ought to be determined in a State proceeding, if the court finds: (1) that the issues of State law cannot be satisfactorily determined in the light of the State authorities; and (2) that abstention from the exercise of federal jurisdiction is warranted either by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view which may be ultimately taken by the State court, or by other circumstances of like character; and (3) that a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) that the parties' claims of federal right, if any, including any issues of fact material thereto, can be adequately

protected by review of the State court decision by the Supreme Court of the United States.

(d) In all cases commenced in or removed to a district court, in which stay of the action pending resort to a State proceeding is required or permitted by subsections (a), (b), or (c) of this section, the district court upon granting such a stay shall retain jurisdiction. It may enter a temporary restraining order or a preliminary injunction, or give other interim relief, if such relief from the district court is necessary to prevent irreparable harm. If the case was removed to a district court, the court shall remand it to the State court for determination, subject to such interim orders as the district court may have made. If the State proceeding proves ineffective in reaching a prompt and final disposition on the merits, the district court may vacate its stay after hearing upon ten days' notice served upon all parties and upon the attorney general of the State, and thereafter may proceed to judgment without regard to subsections (a), (b), and (c) of this section. Unless the stay is vacated the action shall not proceed further in the district court, and the judgment of the State court shall be reviewable in the Supreme Court to the extent provided by section 1257 of this title.

(e) A court of the United States may certify to the highest court of a State a question of State law, if (1) the State has established a procedure by which its highest court may answer questions certified from such court of the United States; (2) the question of State law may be controlling in the action and cannot be satisfactorily determined in the light of the State authorities; and (3) the court expressly finds that certification will not cause undue delay or be prejudicial to the parties.

(f) Except as provided in this section, no court of the United States shall stay any action commenced in or removed to a district court under this title for the purpose of obtaining a decision as to the law of the State from a State court. Nothing in this section, however, shall preclude any court of the United States from exercising its discretion to deny equitable relief or to decline to entertain an action for a declaratory judgment or to continue an action until the determination of a pending case in a State court in which the same issue of law is involved.

(g) This section is inapplicable, and the district court shall proceed to judgment, in actions to redress the denial under

color of any State law, statute, ordinance, regulation, custom, or usage, of the right to vote or of the equal protection of the laws, if such denial is alleged to be on the basis of race, creed, color, or national origin. This section is also inapplicable, and the district court shall proceed to judgment, in actions brought by the United States or an officer or agency thereof.

§ 1372. *Stay of State court proceedings.*

A court of the United States shall not grant an injunction to stay proceedings in a State court, including the enforcement of a judgment of a State court unless such an injunction is otherwise warranted, and: (1) an Act of Congress authorizes such relief or provides that other proceedings shall cease; or (2) the injunction is requested by the United States, or an officer or agency thereof; or (3) the injunction is necessary to protect the jurisdiction of the court over property in its custody or subject to its control; or (4) the injunction is in aid of a claim for interpleader; or (5) the injunction is necessary to protect or effectuate an existing judgment of the court; or (6) the injunction is sought to preserve temporarily the status quo pending determination of whether this section permits grant of a permanent injunction; or (7) the injunction is to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prosecution is so plainly discriminatory as to amount to a denial of the equal protection of the laws.

§ 1373. *Stay of federal court proceedings*

A State court shall not grant an injunction to stay the institution or prosecution of proceedings in a court of the United States, or the enforcement of a judgment of a court of the United States, unless such an injunction is otherwise warranted, and: (1) the injunction is necessary to protect the jurisdiction of the court over property in its custody or subject to its control; or (2) the injunction is necessary to protect against vexations and harassing relitigation of matters determined by an existing judgment of the State court in a civil action.